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No. 504

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

CHARLES ALLEN TAYLOR,
Petitioner

v.

NEIL McELROY, A. TYLER PORT,
Respondents

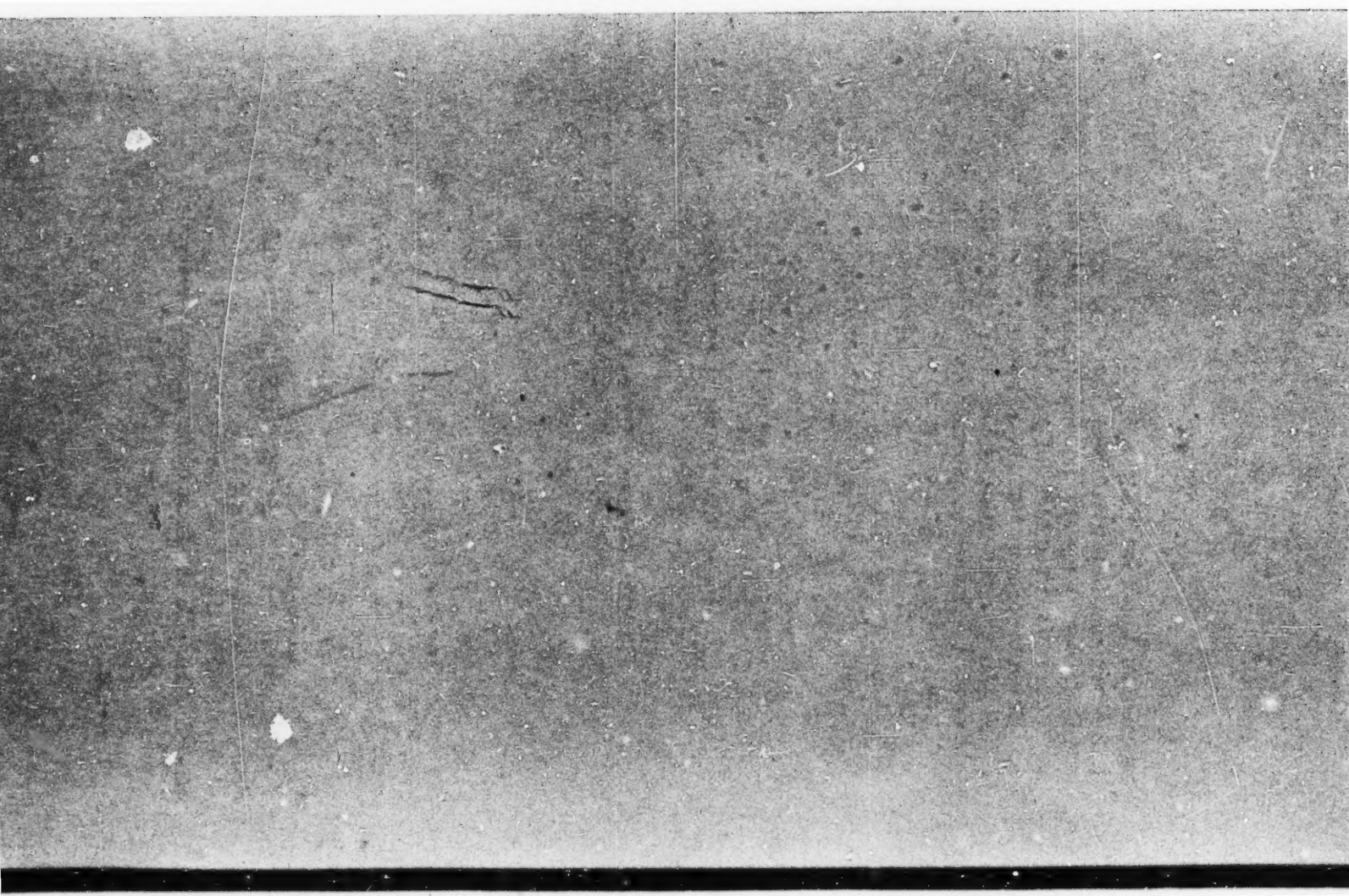
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

JOSEPH L. RAUH, JR.,
JOHN SHEARD,
EUGENE GRESSMAN,
1631 K Street, N.W.,
Washington 6, D. C.,
Attorneys for Petitioner.

Of Counsel:

HAROLD A. CRANEFIELD,
DANIEL H. POLLITT,
RICHARD LIPSITZ



INDEX

	Page
Statement of Conceded Facts	3
I. Neither the Industrial Security Program As Such Nor Its Unfair Hearing Procedure Is Or Could Be Predicated Upon the "Inherent Executive Power" of the President	5
II. The Government's Suggestion That the Fifth and Fourteenth Amendments Provide a Unique Protection Against "Discrimination" Not Available Against "Arbitrary" Governmental Action Is Without Merit	11
III. The Sequence of Events Since Certiorari Was Granted By This Court Demonstrates Petitioner's Extraordinary Vulnerability To Renewed Security Hearings and Renders His Case Anything But Moot	16
A. The Sequence of Events Since This Court Granted Certiorari on December 15, 1958	18
B. Petitioner's Extraordinary Vulnerability to Renewed Proceedings	23
Conclusion	26

Cases

Bolling v. *Sharpe*, 347 U.S. 497	15
Cohens v. *Virginia*, 6 Wheat. (19 U.S.) 264	9
Cole v. *Young*, 351 U.S. 536	6
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123	10, 14
Kent v. *Dulles*, 357 U.S. 116	8, 10
NAACP v. *Alabama*, 357 U.S. 449	10
North American Co. v. *S.E.C.*, 327 U.S. 686, 704-705	9
Peters v. *Hobby*, 349 U.S. 331	9
Rhode Island v. *Massachusetts*, 12 Pet. (37 U.S.) 657	9
Securities and Exchange Com. v. *Chenery Corp.*, 318 U.S. 80	6

Page

Slochower v. *Board of Higher Education*, 350 U.S. 551 11, 12, 13
Totten v. *United States*, 92 U.S. 105 7
Ullman v. *United States*, 350 U.S. 422 9
United States v. *Reynolds*, 345 U.S. 1 7
United States v. *W. T. Grant Co.*, 345 U.S. 629 17
Wieman v. *Updegraff*, 344 U.S. 183 11, 12, 13
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 7

Miscellaneous

Armed Forces Industrial Security Regulation 22
Brown, *Loyalty and Security* 243 (1958) 22
Department of Defense Form 560 22
Executive Order 10501 (18 Fed. Reg. 7049) 9, 22
First Annual Report, Industrial Personnel Security Review Program (1956) 21
National Security Act of 1947, 61 Stat. 495, as amended, 5 U.S.C. 171 5
Report of the Commission on Government Security 7

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REPLY BRIEF FOR PETITIONER

Petitioner has not been able to prepare this reply in the customary responsive manner because of the Government's unwillingness to answer petitioner's brief on the merits. Despite the fact that this Court refused to grant the Government's request that the case be declared moot and instead ordered the Government's suggestion of mootness postponed until the hearing of the case on the merits, the Government's brief totally ignores petitioner's argument on the merits, brusquely referring the Court to its brief in *Greene* without even bothering to assist the Court in

determining which of its arguments in that case are applicable here and which are not. This method of answering petitioner's brief by a curt and blanket cross-reference to the Government's brief in *Greene* not only encompasses arguments wholly inapplicable to petitioner's case,[1] but, far more significantly, omits any answer whatever to vital contentions made by petitioner. For example, the Government's brief in *Greene* fails totally to answer petitioner's argument, based on the detailed facts of his own case (Brief 29-38), that "without confrontation security hearings and determinations are inevitably unfair and wholly arbitrary" and petitioner's analysis and authorities (Brief 38-50) demonstrating that "no governmental interest is served by denial of confrontation in security proceedings." Since there is no answering Government brief to which petitioner can now appropriately respond, we limit ourselves herein to the only three Governmental contentions not fully anticipated and answered in our initial argument:

1) The Government's unprecedented argument in *Greene* (pp. 23-28) that "inherent executive power" is sufficient to support the entire Industrial Security Program without the necessity of legislative authorization;

2) The Government's equally unprecedented suggestion in *Greene* (pp. 36-40) that the Fifth and Fourteenth Amendments provide a unique protection against discrimination not available to those subjected to other forms of arbitrary governmental action;

3) The Government's reliance, in urging mootness here, upon its recent amendment to the Industrial Security Regu-

[1] See, e.g., the Government's argument in *Greene* (pp. 62-64) that Greene "made no attempt to deny the essential facts but his entire case consisted of an attempt to give his own explanation of the significance of those facts. . . ." Petitioner's case, of course, involves the exact opposite—a categorical denial of "the essential facts" of alleged Communist Party membership in 1942-43.

lation, the pertinence and effect of which the Government nowhere explains.

But before discussing each of these three points, a brief statement of the conceded facts may be helpful to the Court.

Statement of Conceded Facts

The Government does not challenge a single material fact in petitioner's statement of the case. Either by express concession or by silence the Government thus confirms petitioner's statement of the following material facts:

1. For almost 2½ years petitioner was held a security risk, with consequent loss of job, livelihood and reputation, on the basis of accusations by secret informants that petitioner had been a Communist during 1942 and 1943[2] and this entire tragedy for petitioner occurred without a single piece of evidence ever having been adduced at any proceeding to support these accusations.

2. The initial charge that petitioner had been a Communist in 1942 and 1943 and "may still have membership in the Communist Party" was overwhelmingly answered at the hearing by the sworn testimony of eleven witnesses that petitioner had in fact been an outspoken *anti-Communist* during this very period, publicly opposing the Communist line on such key issues as incentive pay and the no-strike pledge.

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[2] In its "questions presented" the Government suggests that the Defense Department's adverse determination "was made on the basis of evidence offered by petitioner and confidential information contained in government files. . . ." (Brief 2). Apparently this is only an oversight resulting from a too literal copying of the *Greene* brief, for the Defense Department's adverse security determinations (R. 52, 120) nowhere refer to the evidence offered by petitioner, and the Government has never suggested, and does not now suggest, a single piece of testimony at the "hearing" upon which the Defense Department relied in rendering its adverse decisions.

3. The amended charge—that petitioner had been a Communist in 1942 and 1943 and, in contrast to the earlier charge of possible continuing membership, had been expelled in the latter year—resulted from the secret informants changing and tailoring their stories to fit the testimony concerning petitioner's anti-Communism adduced by petitioner and his supporting witnesses at the hearing on the initial charge.

4. All of the secret informants, upon whom the 2½ years of adverse security determination rested, were casual informants and not professional undercover agents.

5. The Board never examined these secret informants, nor did the Board know their identities (including any possible past criminal or other discrediting records).

6. The Board was forced to rely on second-, third-, and fourth-degree hearsay assertions of secret informers transmitted by unknown persons.

7. Petitioner's "clearance" shortly after certiorari was granted by this Court came just two months after the Defense Department's second final adverse decision that petitioner was a perjurious ex-Communist,[3] a charge which the Government even now refuses to repudiate.

The Court is thus presented with the ugly realities of how non-confrontation operates and what it can do to a defenseless citizen in 20th Century America—a citizen for years denied his job, livelihood and reputation on the basis

[3] The Government appears to find it significant, although it nowhere indicates why, that this October 13, 1958, decision did not find that petitioner "had ever had a sympathetic interest in Communism" or "that he had lied when he denied charges to that effect" (Brief 21). But the same decision does find that petitioner's "sworn reply" and his "testimony" "were deliberately and knowingly either false or misleading" in denying that he had ever been a member of the Communist Party and in denying that he had "no knowledge of the subversive aims and purposes of the Communist Party" (R. 122). This finding appears identical with the one whose omission the Government finds "significant."

of statements by secret (and casual) informants, unknown both to petitioner and the reviewing Board, who altered their stories after being informed of petitioner's defense of opposition to the Communist Party line; a citizen whose testimony under oath rebutting every minute detail of the charge against him,[4] and corroborated by eleven forceful witnesses, is rejected as perjurious by a Board which accepts in preference the accusations of secret informants it never saw, knew, or examined. It is not surprising, on this record of indefensible injustice, that the Government makes its sole response by an elliptical cross-reference to a case involving totally different facts. But what is surprising and sad is that the Government has forsaken its normal course of confessing error when it is unwilling to defend its conduct before this Court.

I

Neither the Industrial Security Program as Such Nor its Unfair Hearing Procedure Is or Could Be Predicated Upon the "Inherent Executive Power" of the President

The Government comes very near conceding, if it does not actually concede, the argument for petitioner in *Greene* that there is no statutory authority for the Industrial Security Program. Its reliance upon the legislation providing for the organization of the defense establishment (National Security Act of 1947, 61 Stat. 495, as amended, 5 U.S.C. 171, *et seq.*), not as a statutory base for the program, but simply

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[4] We are not entirely clear just what the Government means in its Brief (p. 9, 16) when it states that petitioner's affidavits in response to the two sets of charges denied their truth "in general." Any reading of petitioner's sworn denials (R. 42, 80) and of petitioner's testimony (R. 353-412) will make crystal clear that there was nothing concerning the charge of petitioner's alleged relationship with Communism that was not specifically and categorically denied.

as "another recognition of the necessarily inherent character" of the President's authority, and its statement that "arguably" the authority for the program may be "inferred" from various other statutes cited to the Court of Appeals in *Greene*, evidences an almost total abandonment of reliance upon Congressional action as authority for the program (Gov't *Greene* Brief 26). And, what is at least equally significant, the Government totally concedes, by failing to make any answer whatever, the additional argument made by petitioner here (Brief 50-56) that, even if there could conceivably be some statutory base for an industrial security program as such, no existing statute can be deemed to authorize the unfair hearing procedure prescribed by the contested Regulation.[5]

No longer placing any real reliance upon a statutory base for the Industrial Security Program, the Government now rests the authority of the Defense Department to promulgate and operate the program squarely upon the "executive power" of the President and his power as "Commander in Chief of the Army and Navy" (Gov't *Greene* Brief 23). Several answers to this contention are readily available:

1. The Defense Department's Industrial Security Program never having been predicated upon the inherent authority of the President, the Government cannot now justify it on that basis. *Cf. Securities and Exchange Com.* v. *Chenery Corp.*, 318 U.S. 80; *Cole* v. *Young*, 351 U.S. 536,

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[5] The Government's half-hearted suggestion in its brief in *Greene* (p. 27, n. 8) that "appropriations constitute legislative ratification of the program" does not appear to be seriously advanced. The pages of the only appropriation hearing to which the Government refers do not evidence any ratification of the program as a whole, for they dealt only with a request for funds to pay lost wages to persons wrongfully held to be security risks. Hearings to obtain funds to ameliorate the unjust results of a program would hardly appear to evidence Congressional ratification or approval of the program itself, much less its unfair hearing procedure.

557 n. 20. The Government has failed to produce for this Court a single order or regulation of the Defense Department establishing or implementing this program which relies upon the inherent power of the President for its authority. Furthermore, the Report of the bipartisan Commission on Government Security, which included in its membership four appointees of the President, including two top Government officials and, at one time, an Assistant Secretary of Defense (p. iii), stated categorically that "the legal basis for the program . . . must be found in a statute which authorizes the executive branch of the Government (and the Department of Defense in particular) to establish this program" (p. 250). The Government's last minute reliance upon "inherent executive power" is eloquent evidence of the absence of just such a "legal basis" for the program as the Commission on Government Security found necessary.

2. The President has no "inherent executive power" to enact the Industrial Security Program. The creation of a permanent program to screen three million workers in defense plants to detemine their security reliability—a program involving charges, hearings, decisions, etc.—is certainly no less the exercise of a "lawmaking" function than the power to seize property, which was refused the executive by this Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579.[6] Indeed, if a single *ad hoc* and emergency seizure of private property is deemed a part of the lawmaking function of Congress, the establishment of a

[6] Despite the fact that petitioners in both *Greene* and *Taylor* referred to the *Youngstown* case to anticipate any possible Governmental argument on inherent power, the Government has made no effort to distinguish the case or even to mention it. Instead, the Government places its reliance upon *United States* v. *Reynolds*, 345 U.S. 1, and *Totten* v. *United States*, 92 U.S. 105, which deal with the entirely different subject of the right to obtain or reveal secret information in the course of judicial proceedings.

permanent program screening millions of American workers would be even more clearly within the "exclusive constitutional authority" of Congress (at p. 588).

Moreover, this Court has had even more recent occasion to reject a Government contention of "inherent executive power" similar to that now being urged. In *Kent* v. *Dulles*, 357 U.S. 116, this Court invalidated passport restrictions as lacking in statutory foundation notwithstanding the Government's arguments concerning "inherent executive power." In its *Kent* brief (p. 30) the Government urged that "The Secretary's authority [over passports] finds its origin in his executive powers as the chief officer under the President in the field of foreign affairs." And after reviewing this so-called "executive power", the Government went on to conclude (at p. 32) that the basic passport statute merely stands as

> "a congressional recognition, implementation, and confirmation of an existing executive authority, rather than as a new delegation of Congressional power or a limitation or expansion of powers already possessed by the Secretary."

This Court quickly dispensed, however, with any possibility that, in the absence of statutory authority, inherent executive power could support general passport regulations and prescriptions:

> ". . . the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress. *Youngstown Sheet & Tube Co.* v. *Sawyer* . . ."

So here, if the liberty to retain private employment, to earn a livelihood and to enjoy an honorable reputation, is to be

regulated, it must be pursuant to the lawmaking functions of Congress.[7]

3. Even if the President had the "inherent executive power" claimed for him by the Government, that power has never been asserted by the President himself nor delegated by him to the Defense Department. Executive Order 10501, upon which the Government apparently relies as delegation (Gov't *Greene* Brief 27, n. 9)—providing for the classification of security information and its dissemination only through authorized channels—does not give the faintest intimation of a delegation of authority to establish a general program of "screening," "hearing," and "clearance" for millions of industrial workers.[8] It would certainly be inconsistent with this Court's fundamental principle of avoiding constitutional issues wherever possible, to determine the grave question whether the President has the "inherent executive authority" to promulgate and operate the Industrial Security Program in the absence of a clear assertion by and clear delegation from the President of the claimed authority. The Government has presented to this Court no such clear assertion or delegation of power. We respectfully suggest that, in the absence of the explicit Presidential exercise of so doubtful an "inherent executive power," the

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[7] Of course, even if this Court should find "inherent executive power" to establish an industrial security program, the limitations of the Fifth Amendment would restrict that power no less than they restrict the power of Congress to prescribe unfair hearing procedures. This Court cannot hold constitutional executive powers free of the limitations embodied in the Bill of Rights, for it is its duty, when two constitutional provisions may come into conflict, "so to construe the Constitution as to give effect to both provisions." *Cohens* v. *Virginia*, 6 Wheat. (19 U.S.) 264, 393. See also *Rhode Island* v. *Massachusetts*, 12 Pet. (37 U.S.) 657, 723; *North American Co.* v. *S.E.C.*, 327 U.S. 686, 704-705; *Ullman* v. *United States*, 350 U.S. 422, 428-29.

[8] The mere failure of the President to express his disapproval of the program could not, of course, amount to Presidential ratification. *Peters* v. *Hobby*, 349 U.S. 331, 345.

Government is unwarranted in asking this Court to render a decision on that vital constitutional issue.

4. In essence, the Government's argument on inherent power, like the remainder of its argument, is a request that this Court treat the Industrial Security Program as though it involved nothing more than the executive withholding of classified information from unauthorized persons. What the Government is really asking this Court to do is to close its eyes to the necessary and conceded consequences (Gov't *Greene* Brief 30, 32, 56) of the withholding of classified information under the Industrial Security Program. But petitioner's case does not involve a casual request for access to classified information simply for the sake of examining that information; it involves an individual whose most vital interests depend upon his access to classified information and upon his obtaining a fair hearing to resolve the most serious charges levelled against him by his Government.

The Government cannot obscure the far-reaching consequences of the Industrial Security Program simply by referring to "internal operations of the executive branch" (Gov't *Greene* Brief 23). There is nothing "internal" in the impact of the Government's action upon petitioner; his most elementary rights—job, livelihood, and reputation—all depend upon a fair hearing for determination of his security status. No more here than in analogous areas of constitutional adjudication can this Court be blind to the inevitable impact of governmental action upon the citizen. See *NAACP* v. *Alabama*, 357 U.S. 449; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123. No more here than in analogous areas can this Court consider the "inherent executive power" in a vacuum, divorced from its real impact upon the liberties of American citizens. *Kent* v. *Dulles*, 357 U.S. 116 (see p. 8, *supra*).

II

The Government's Suggestion that the Fifth and Fourteenth Amendments Provide a Unique Protection Against "Discrimination" Not Available Against "Arbitrary" Governmental Action is Without Merit

The Government concedes in its *Greene* brief (p. 29) that petitioner's interest in his job, his livelihood and his reputation are sufficient to give him "standing to sue." But, the Government goes on to assert in *Greene*, even conceding that the action taken by the Defense Department "clearly affects sufficient interests to enable him to assert whatever rights he may have," Greene's interests are not sufficient to be deemed "liberty" or "property" entitled to procedural due process protections. Here, of course, the Government runs squarely into this Court's recent and definitive holdings in *Wieman* v. *Updegraff*, 344 U.S. 183, and *Slochower* v. *Board of Higher Education*, 350 U.S. 551, that procedural due process protections do apply to arbitrary dismissals from public employment and to the corollary, as petitioner pointed out in his initial brief (p. 22), that if the interest in public employment is sufficiently substantial to invoke due process protections, certainly the interest in private employment is *a fortiori* sufficient.

Faced with the necessity of finding a distinction of *Wieman* and *Slochower* at all costs, the Government tenders a theory admittedly unexpressed by any court or other authority—that those cases do not indicate that the "right" or "privilege" of public or private employment is a sufficient interest to be deemed "liberty" or "property" entitled to due process protections; rather, argues the Government, those cases are predicated upon the theory that Wieman and Slochower were the victims of *discrimination* and, as such, entitled to protection irrespective of whether

they were deprived of "liberty" or "property" in their dismissals from employment. As the Government states the proposition in *Greene:*

> "We suggest that the true explanation of the *Public Workers-Wieman-Slochower* line of cases is an evolving doctrine that the Constitution itself creates an affirmative right, regardless of the nature of the interests affected or of the protection otherwise afforded them, not to be discriminated against by state or federal government on the basis of an invidious classification. The evil condemned is the discrimination itself, and it is not essential that the governmental action affect any other legally-recognized interest apart from the right to be free from discrimination. In its procedural requirements, on the other hand, the due process clause is necessarily a purely negative command; one does not have a 'right' to have a fair hearing but only a right not to be deprived of certain kinds of interests *without* a fair hearing. Accordingly, an existing interest must be recognized independently of the due process clause before its procedural requirements become applicable" (pp. 37-38).

We respectfully suggest (i) that the *Wieman* and *Slochower* cases on their face repel the Government's argument, and (ii) that the distinction between discrimination and other forms of arbitrary governmental action is historically and logically unsound.

(i) In the *Wieman* case this Court expressly held that, whether or not "an abstract right to public employment exists . . . constitutional protection does extend to the public servant whose exclusion . . . is patently *arbitrary* or discriminatory" (at p. 192) (emphasis supplied). Although state action was involved, this Court made no refer-

ence whatever to the equal protection clause; it expressly held that the denial of Wieman's job "offends due process" (at p. 191).

In *Slochower* this Court found it to be a denial of due process to dismiss a state employee simply because he had invoked the Fifth Amendment privilege against self-incrimination before a federal legislative committee. The Court held that "the State must conform to the requirements of due process" (at p. 556) and that "the summary dismissal of appellant violates due process of law" (at p. 559). There was no faintest element of discrimination in *Slochower;* as this Court there pointed out, Slochower presented a case where "there has not been the 'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process . . ." (at p. 559). Again, although state action was involved, this Court made no reference whatever to the equal protection clause, but expressly held Slochower's dismissal "violates due process of law."

Since *Wieman* and *Slochower* themselves refute the attempted distinction that freedom from discrimination holds a unique position in our constitutional constellation not held by freedom from other forms of arbitrary governmental action, this would appear to be a sufficient answer to the Government's novel suggestion. It does, however, seem appropriate also to refer very briefly to the theoretical and historical fallacy in the Government's suggestion.

(ii) There is no principle of our jurisprudence that would warrant a preference for freedom from discrimination over freedom from other forms of arbitrary governmental action. No legal, moral or logical reason has been suggested by the Government to support its contention that protection against discrimination should be singled out and given a higher role in our jurisprudence than protection

against other forms of arbitrary governmental conduct. On the contrary, as our initial brief points out, procedural due process holds the highest possible role in our constitutional scheme (pp. 20-26). It is precisely because the procedural guarantees of due process do hold so high a status that novel procedural claims have been consistently deemed to fall within its ambit. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123. As Mr. Justice Frankfurter there stated:

> "Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of *procedural fairness*. Due process is perhaps the *most majestic concept in our whole constitutional system*" (at pp. 173-174) (emphasis supplied).

It may well be that procedural fairness is paramount even to freedom from discrimination, but it would serve no useful purpose to discuss further the relative status of these two major constitutional guarantees; what is clear is that procedural fairness has never been placed second to freedom from discrimination or any other constitutional guarantee.

Nor is the Government's reliance upon the wording of the Fourteenth Amendment well placed. It is true, of course, that the Fourteenth Amendment provides that no person shall be deprived of "life, liberty, or property, without due process of law" and that no person shall be denied "the equal protection of the laws." From this wording the Government concludes that "the latter is absolute, while the former is in terms applicable only to a deprivation of life, liberty or property" (Gov't *Greene* Brief 38). But the Government cites no legislative history of the Fourteenth Amendment indicating that the equal protection clause was thus intended to be more broadly applied than the due

process clause or that a person might be protected against discrimination under circumstances where he would not be protected against other forms of arbitrary conduct. Furthermore, and what is especially relevant to the instant case, we are here concerned with the Fifth Amendment, which contains a due process clause and no equal protection clause. The history and prime meaning of the words "due process" bespeak their application to fair process and procedure above all else. Indeed, the historical debate has not been whether protection against discrimination is *preferred* under the Fifth Amendment, but whether it is afforded by the Fifth Amendment *at all*. *Cf. Bolling* v. *Sharpe*, 347 U.S. 497. Constitutional history repels the suggestion that procedural fairness holds a status subordinate to any other right or privilege under the due process clause of the Fifth Amendment.

Actually, the Government has conceded away its suggestion that petitioner has not been denied "liberty" or "property" within the meaning of the Fifth Amendment. The Government admits (Gov't *Greene* Brief 32) that "the withholding of military secrets from petitioner might have the same practical consequences as would a legal bar to his employment in the aircraft industry." Nothing could be a clearer denial of "liberty" or "property" than a legal bar to employment. Yet the Government asks the Court to disregard its own concession and treat the case as though it involved nothing more than a casual observer seeking access to classified information for the mere sake of access.[9]

[9] Actually, petitioner has not sought access to classified information at all. His employer, Bell Aircraft, requested petitioner's clearance for access to "secret" information (R. 15-16) so that Bell and petitioner could continue an employment relationship satisfactory to both parties. The Government's contention that nothing is involved except access to classified information studiously avoids the realities of the situation; what is

No more in determining whether petitioner's "liberty" or "property" are involved than in determining whether the Executive had inherent power (p. 10, *supra*) will this Court prefer form to substance and close its eyes to the inevitable and conceded consequences of Governmental action. If, as is admitted, the consequences of a security risk determination are the same as if a legal bar to employment had been erected by the Government, we do not see how the constitutional norm of fundamental fairness in procedure can be held inapplicable.

III

The Sequence of Events Since Certiorari Was Granted By This Court Demonstrates Petitioner's Extraordinary Vulnerability to Renewed Security Hearings and Renders His Case Anything but Moot

Petitioner will not burden this Court with a full-scale reargument of the question of mootness. On February 17, 1959, petitioner filed his "Supplemental Memorandum for Petitioner on Mootness" answering the contentions previously made by the Government. Neither the Government's subsequent brief on the merits nor its Supplemental Memorandum setting forth the "modified" Regulation contains any argument on mootness nor any answer to petitioner's Supplemental Memorandum of February 17th. We, therefore, respectfully refer the Court to our initial "Opposition to Government's Suggestion of Mootness" and our "Supplemental Memorandum for Petitioner on Mootness," together with the discussion herein of the recently published "modification" in the Regulation, as an overwhelming

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actually and obviously involved is the Government's administrative action under the Industrial Security Program cutting across an existing contractual relationship between Bell and Taylor and depriving petitioner of his "liberty" and "property" in that contractual relationship—as well as in his livelihood and his reputation.

demonstration of this Court's continuing jurisdiction to resolve the very live controversy at bar.

While the initial briefs on mootness in this Court appeared to disagree concerning the applicable rule in cases where the Government discontinues conduct against which a private party seeks equitable relief, that disagreement has now been largely resolved. The Government concedes that this Court's rule hinges on the issue whether

> *"there is a strong, real, or substantial likelihood that the challenged government action will be repeated against the particular person"* (Memorandum in Reply on Mootness 16).

Actually this Court, in *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633, has recently adopted a formulation, more charitable to the party seeking relief, *requiring defendant to demonstrate that "there is no reasonable expectation that the wrong will be repeated."* But, whatever may be the precise formulation, the parties are in agreement that continuing jurisdiction hinges upon the "likelihood of recurrence" of the conduct challenged by petitioner.

Moreover, there is also apparent agreement that the mere granting of last-minute security "clearance" to petitioner has not, as such, afforded him protection against repeated subjection to the security "hearing" procedure against which he seeks relief. Nowhere in the Government's presentation is there any refutation of the material presented at pp. 21-25 of our initial Opposition to Mootness, demonstrating that security clearance is a matter of "continuous screening, scrutiny, and surveillance" and that those once seriously charged are regularly subjected to an unending series of security proceedings. All that the Government appears to be saying to this Court in its Memorandum in Reply on Mootness is that, unlike others in the security

program who have been subjected to repeated security proceedings, petitioner's "clearance", made in connection with a "general modification" of the standard of clearance, provides him with assurance against renewed proceedings. But, far from providing assurance against renewal, a brief review of the events since this Court granted certiorari on December 15, 1958, and of the "modified" Regulation itself, demonstrates that petitioner holds the most dubious and tenuous type of clearance, and would be particularly vulnerable to renewed security proceedings if the Government should succeed in disarming this Court of its power to afford relief to petitioner.

A. *The Sequence of Events Since This Court Granted Certiorari on December 15, 1958*

After certiorari had been granted, the Acting Secretary of Defense, on December 31, 1958, issued an order granting petitioner a security clearance "in the national interest." Thereafter, on January 9, 1959, the Government filed a Suggestion of Mootness urging that, since petitioner had been cleared, the controversy had ended. No indication was given this Court in the Government's Suggestion of Mootness of the unique "clearance" granted petitioner. Although there was an oblique reference to an order of the Acting Secretary of Defense, likewise issued on December 31, 1958 (see Suggestion of Mootness 10, 18), its effect on petitioner was neither referred to nor explained. In that order it was indicated that the Department was considering a revision in the Regulation, permitting Hearing Boards, in determining whether to grant access to classified information, to consider "the level of classified information at which access is sought, and to make a determination which takes that factor into account." As already indicated, there was no slightest intimation in the

Government's initial Suggestion of Mootness as to how this prospective change in the Regulation might affect the issue of mootness in petitioner's case or whether in fact it would affect it at all.

Since petitioner could perceive no possible relationship between the granting of a secret clearance to one the Government had just a matter of weeks earlier finally determined to be a perjurious ex-Communist and a possible change in the Regulation which would take into consideration that he was seeking access to "secret" information rather than to "confidential" or "top secret" information, petitioner's initial Opposition to Mootness, filed January 28, 1959, made no reference to the December 31 order of the Acting Secretary. Petitioner did, however, point out to the Court that he was the only known security defendant who had ever been "cleared" not in the interest of "national security" but only "in the national interest"; that the Secretary had violated his own regulation requiring the issuance of findings on each adverse allegation; and that, obviously, the Government had *not* determined petitioner to be innocent of the charges, but had simply sought, without confessing the unfairness of its "hearing" procedure, to remove the case from the Court's consideration.

On February 13, 1959 the Government filed its Memorandum in Reply on Mootness, conceding for the first time that petitioner had been given a "clearance" without ever being found either innocent or secure (at pp. 4-7). Moreover, the oblique reference in the Government's earlier Suggestion of Mootness that the prospective modification in the Industrial Security Regulation would take into account "the level of classified information at which access is sought" was now dropped. Instead, the Government suggested that the prospective Regulation would provide something altogether different: rather than permitting consideration of the

"level of clearance" ("confidential", "secret" or "top secret"), the Government informed this Court that the prospective modification would take into account the accused individual's *particular job position*. Thus the Government in its Memorandum in Reply referred to "consideration of the employee's position" (p. 13) and of his "level of position" (p. 14); and this Court was expressly informed that petitioner had been "cleared," even assuming the truth of all the findings that had been made against him (at p. 6), because he

> "is a lathe operator and he was a tool and die maker (milling machine operator) in a large aircraft plant—not an important official with wide supervisory or executive functions . . ." (at p. 5).

It was thus repeatedly made to appear that the prospective modification in the Regulation would take into account the particular job position held by the individual rather than the "level of clearance" sought for him.

On February 17, 1959, petitioner filed his Supplemental Memorandum on Mootness analyzing the Government's latest representations concerning the as yet unpublished modification in the Regulation. Petitioner pointed out (n. 4, p. 4) how "Taylor-made" was the "general modification" which was concededly conceived *only* "when petitioner's case was brought to the attention of the Acting Secretary," was never mentioned in a published document until the very day that petitioner was "cleared", and had yet to be stated in a form which permitted its promulgation. Moreover, petitioner demonstrated that, if he had indeed received clearance on the basis of such a tenuous balance between his particular job position and the charge of perjurious ex-Communism, then at any moment that tenuous balance was subject to reversal by any change in

his working position at Bell Aircraft or elsewhere (at pp. 5-6). Apparently petitioner's suggestions as to the unworkability of this proposal and his contention that it would "increase rather than decrease the likelihood of petitioner's subjection to renewed proceedings" (at p. 5) was convincing to the Government, for the subsequent actual modification of the Regulation, as we shall see, completely abandoned the idea of weighing a particular job position against the derogatory information.

On March 24, 1959, the much heralded change in the Regulation was finally furnished to this Court (Supplemental Memorandum for the Respondents), still without any explanation as to how it might reduce petitioner's vulnerability to renewed security proceedings. And the "modification," as actually promulgated, utterly contradicts the Government's prognostications as to its content, made only a month before at a time when the Government was urgently seeking to avoid this Court's review of the merits. Instead of taking into account "the employee's position", "level of position", and whether or not he is "an important official with wide supervisory or executive functions," the published change *has nothing whatever to do with the employee's job or position.* All that the "change" in the Regulation does is to make clear that the "level of clearance" sought (confidential, secret, or top secret) shall be taken into account—as it has always been in the past.[10]

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[10] It is quite clear that the so-called modification in the Regulation, expressly permitting Hearing Boards to consider which "level of clearance" is being sought, is not in fact a modification at all, for the Hearing Boards have *always* been required to consider the level of clearance under review:

Even prior to the "modification", every case reaching the Hearing Board involved a clearance application only for a particular category of classified information—i.e., confidential, secret, or top secret. See R. 30, and case summaries appended to First Annual Report, Industrial

To summarize what the Government has done since this Court granted certiorari:

1. In its initial Suggestion of Mootness, on January 9, 1959, the Government implied to the Court that petitioner had been cleared like any other security defendant.

2. Then, in its Memorandum in Reply on Mootness, on February 13, 1959, the Government argued to the Court that petitioner had been cleared because of a policy of weighing the particular job position against the derogatory information.[11]

Personnel Security Review Program (1956), pp. 45, 61, 63, 66, 85, *et seq.* While the formal findings of the Hearing Boards did not expressly refer to the classification level at which clearance was being approved or rejected, the decision was always based on the level of access originally sought, and again expressly reflected in the "letter of consent" subsequently issued to the contractor where the individual was cleared. Department of Defense Form 560, Sec. 6-110, Armed Forces Industrial Security Regulation, printed in Bureau of National Affairs Manual on Government Security and Loyalty, p. 25:27, 81; see also Brown, *Loyalty and Security* 243 (1958).

Equally important, the Regulation itself always required the Hearing Board's consideration of the level of clearance sought. The ultimate determination which Hearing Boards were required to make under the Regulation (Sec. IV, Par. 20e.) was whether the "granting of *clearance*" was proper. "Clearance" in turn was specifically defined by Sec. I, Par. 2e of the Regulation, even before its amendment, in terms of the "confidential", "secret" and "top secret" classification of Ex. Order 10501 (18 Fed. Reg. 7049):

> "The term 'clearance' means an administrative determination, in accordance with approved policy, that a contractor or contractor employee is eligible to have access to classified information *of specified categories classified in* accordance with Executive Order 10501 . . ." (emphasis supplied).

Thus a Hearing Board could not, without disregarding the express definition of "clearance" prescribed by the Regulation itself, have granted a clearance without regard to the classification level sought. All that the "modification" has accomplished is to articulate in certain additional sections of the Regulation the classification level which, by virtue of the Regulation's definition of "clearance", has always been an integral part of the Hearing Boards' determination.

[11] The Government's suggestion in its February 13 Memorandum in Reply on Mootness (at p. 5) that this new policy was already in effect

3. Finally, in the modification in the Regulation presented to this Court on March 24th, the Government implies, without even expressly so stating or giving any reason therefor, that petitioner was cleared because of the change in the Regulation to take into account different "levels of clearance."

The Government's elusive and constantly varying statements to this Court as to the reasons for petitioner's clearance and as to the new policy being adopted in the modified Regulation are confusing to petitioner, as they no doubt are to this Court. But we respectfully suggest that one point does emerge without confusion—the Government had no new precise policy on December 31st affecting petitioner's case in any way and its sole reason for "clearing" petitioner was the proximity of this Court's process. We turn now to indicate how the Government's tortuous course in this case actually serves to reveal petitioner's extraordinary vulnerability to renewed proceedings rather than to assure against such renewal.

B. *Petitioner's Extraordinary Vulnerability to Renewed Proceedings*

The Government refuses to exonerate petitioner (Memorandum in Reply 4-7). Although the Defense Department has expunged the findings against him, he remains a perjurious ex-Communist for the purposes of the Industrial Security Program. As such, he is extraordinarily vulnerable to renewed proceedings.

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was questioned by petitioner in his Supplemental Memorandum (at p. 5) on the ground that no regulation or instructions to the field placing the policy into effect had been reported to the Court. If any such policy was actually in effect on February 13, when the Government's Memorandum in Reply was filed, it had a short life, for it was abandoned by March 24th when the "modification" in the Regulation was presented to this Court.

If the Government's representations in its February 13th Memorandum in Reply on Mootness were correct, then petitioner was cleared because even a perjurious ex-Communist may hold the position of a lathe operator with access to "secret" information. But, as we pointed out in our February 17th Supplemental Memorandum on Mootness, a security clearance based on a particular job position would be an exceptionally tenuous one. In petitioner's work at Bell Aircraft, the classified materials his job requires him to see are not fixed but changing; at any moment the tenuous balance of his "position and personal history" may shift without any initiative on his part. Furthermore, he may himself desire to obtain different work at Bell or elsewhere and the slightest shift in job position would bring a new round of security proceedings. Therefore, if the Government's representations that petitioner's clearance was based entirely on the job position he holds were correct, then petitioner, as one still deemed a perjurious ex-Communist, may at any moment be subjected to renewed proceedings.

But now that the "modified" Regulation has finally appeared, there is a very real question whether the Government's representations referred to in the previous paragraph were correct. The change in the Regulation actually promulgated takes no account of job position; all it does is refer to level of clearance which has always been considered (n. 10, p. 21, *supra*). Although the Government refuses to say how this "level of clearance" consideration affects petitioner, we cannot believe that the Government would suggest to this Court that a perjurious ex-Communist may have access to all information at the "secret" level regardless of job position. Since such a suggestion is totally implausible, it seems far more likely that petitioner's clearance had nothing whatever to do with the "modified" Reg-

ulation, and was either based upon the job position policy now abandoned or, as we have already suggested, was simply based upon the proximity of this Court's process. In either event, the removal of this Court's process would leave petitioner immediately in jeopardy of renewed proceedings.

Petitioner's vulnerability to renewed proceedings can fairly be called unique. Unlike every other security defendant who has been cleared, petitioner has been granted "clearance" without exoneration on the merits of the extremely serious charges against him. As the only accused "cleared" without being found either secure or innocent of grave security charges, petitioner holds the most precarious and momentary security clearance of any employee now subject to the Industrial Security Program.

No more than private wrongdoers may the Government be allowed to tamper with justice in an attempt to prevent equitable relief which might limit the Government's ability to continue its wrongful conduct. Accepting the Government's own formulation that this Court retains jurisdiction where "there is strong, real, or substantial likelihood that the challenged Government action will be repeated against the particular person," it is eminently clear that petitioner's case meets that test. As long as petitioner remains so clearly subject to the unfair hearing procedure against which he seeks relief, this Court has the power, consistently recognized since *Trans-Missouri* and *Southern Pacific*, to adjudicate his case. A serious and real controversy continues between petitioner and his Government over which this Court retains its constitutional power of adjudication.

Conclusion

It is respectfully submitted that the judgment of the District Court be reversed with instructions to grant petitioner appropriate declaratory and injunctive relief.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
JOHN SILARD,
EUGENE GRESSMAN,
1631 K Street, N.W.,
Washington 6, D. C.,
Attorneys for Petitioner.

Of Counsel:

HAROLD A. CRANEFIELD,
DANIEL H. POLLITT,
RICHARD LIPSITZ

(4881-9)

SUPREME COURT OF THE UNITED STATES

No. 504.—October Term, 1958.

Charles Allen Taylor, Petitioner, v. Neil McElroy, A. Tyler Port.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 29, 1959.]

Per Curiam.

This is a companion case to *Greene* v. *McElroy*, decided today, and concerns an industrial worker who was denied clearance to classified defense information and consequently discharged from his employment as a lathe operator and tool and die maker at a plant which manufactured aircraft for the Government.

Prior to 1956, petitioner had a Confidential clearance. In that year, he was denied Secret clearance and his Confidential clearance was suspended. He demanded and was accorded a hearing similar to the one afforded petitioner in *Greene* v. *McElroy*, *supra*. The Hearing Board concluded that petitioner's access to classified defense information was "not clearly consistent with the interests of national security." Later, he was afforded another hearing with similar results. Petitioner then filed an action asking for a declaration that he was entitled to a hearing at which he could confront the informants whose statements were used against him, a declaration that the denial of clearance violated his rights under the Fifth Amendment, and an injunction restraining respondents from enforcing the decision denying clearance. Respondents prevailed on a motion for summary judgment and, on December 15, 1958, we granted certiorari to the Court of Appeals before argument was had in that court because

of the pendency here of *Greene* v. *McElroy*, *supra*. 358 U. S. 918.

On December 31, 1958, the Department of Defense notified all interested parties, including petitioner, his counsel, and his ex-employer, that the Secretary of Defense had determined "that the granting of clearance to Mr. Charles Allen Taylor for access to Secret defense information is in the national interest." On January 9, 1959, respondents filed a suggestion of mootness. We postponed consideration of that question to the hearing of the case on the merits. 359 U. S. 901.

At the oral argument in this case, the Solicitor General made the following representations:

1. The Secretary of Defense in determining that petitioner was eligible for clearance to obtain access to information classified "Secret" did not intend by his reference to "the national interest" to differentiate between petitioner's status and that of other employees whose eligibility for clearance has been found to be "clearly consistent with the interests of national security."*

2. The findings of the various Hearing Boards which passed on petitioner's fitness for clearance have been expunged from all records and no longer have any vitality or effect.

3. Petitioner was afforded clearance on December 31, 1958, after having been denied clearance for over two years, because of a change in applicable Department of Defense regulations.

4. Pursuant to existing Department of Defense procedures, the evidence in petitioner's file will not be used again as a basis for revoking petitioner's clearance.

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*The respondents have filed a letter in this Court from the General Counsel of the Department of Defense which makes an identical representation.

5. Petitioner is eligible under applicable regulations for compensation for wages lost during the time he was unemployed due to the clearance revocation and denial.

In view of the fact that petitioner has received clearance, the ultimate relief which he demanded, and in view of the representations of the Solicitor General to the effect that petitioner stands in precisely the same position as all others who have been granted clearance, that the evidence in petitioner's file will not be used against him in the future, and that the findings against petitioner have been expunged, this case is moot.

The judgment of the District Court is vacated and the case is remanded to that court with instructions to dismiss the complaint as moot.

It is so ordered.